

THE PETITION IN THIS CASE  
HAS BEEN SEALED BY ORDER  
OF THE COURT AND IS THERE-  
FORE UNAVAILABLE TO THE  
PUBLIC.

JUN 27 1979

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. 78-1904

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HOWARD MORLAND, ERWIN KNOLL,  
AND SAMUEL DAY, JR.,

Petitioners,

v.

THE HONORABLE ROBERT A SPRECHER AND  
THE JUDGES OF THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT,

Respondents.

---

RESPONSE TO MOTION FOR LEAVE TO FILE A  
PETITION FOR WRIT OF MANDAMUS AND  
PETITION FOR WRIT OF MANDAMUS

---

Acting Chief Judge Walter J. Cummings on behalf of the  
United States Court of Appeals for the Seventh Circuit files

this Response to the Petition for Leave to File a Petition for Writ of Mandamus.\*

In support of this Response, Acting Chief Judge Walter J. Cummings states the following:

- 1) Although the preliminary injunction which was appealed in No. 79-1428 was entered on March 26, 1979, the joint notice of appeal of The Progressive, Inc., and the individual defendants was not filed until April 12, 1979;
- 2) Prior to the filing of the notice of appeal, John L. Gubbins, Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit, called Brady Williamson, counsel for one of the defendants-appellants, and asked if the preliminary injunction was going to be appealed. Mr. Gubbins offered to conduct a docketing conference pursuant to Circuit Rule 3 and Federal Rule of Appellate Procedure 33 in order to expedite the briefing and to set oral argument prior to June 18, 1979, the last day of the 1978-1979 Term;

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\* Chief Judge Thomas E. Fairchild has disqualified himself from these appeals.

- 3) The defendants-appellants filed a notice of appeal 17 days after the preliminary injunction and did not ask to expedite the appeal until they mailed a Motion for Expedited Appeal on April 20, 1979;
- 4) After receipt of the motion to expedite, John L. Gubbins had additional conferences with counsel for the parties. The motions to expedite and suggestion for an en banc hearing were initially scheduled for a discussion at a judges' meeting on May 2, 1979. The judges postponed such consideration when Brady Williamson, counsel for The Progressive, Inc., suggested that the appeal might be moot and asked the court to postpone consideration of the motion and suggestion. After the court was advised some days later that the appeal would not be moot, the motions to expedite and suggestion for hearing en banc were considered;
- 5) The Motion for Expedited Appeal as well as the suggestion to hear the appeal/en banc were denied on May 16, 1979. However, the court agreed to hear the appeal in the first week of the next Term, starting Monday, September 10, 1979;

- 6) Based on a conference with John L. Gubbins, the court also entered an order dated May 17, 1979, setting up a briefing schedule in which the reply brief was due July 2, 1979. All counsel were in agreement with that schedule. The parties also agreed that the appeal would not be set before July 16, 1979, in order to accommodate the schedule of one of the attorneys;
- 7) On May 24, 1979, Circuit Judges Luther M. Swygert, William J. Bauer, and Harlington Wood, Jr., and Senior Staff Attorney John L. Gubbins had another conference with counsel for all the parties. At that conference the briefing schedule was extended by agreement of all parties until August 1, 1979, for appellants' reply brief because of problems that appellants were experiencing in obtaining in camera materials needed to prepare their brief;
- 8) On June 15, 1979, District Judge Robert W. Warren denied appellant's motion to reconsider and vacate the preliminary injunction of March 26, 1979;
- 9) On June 15, 1979 and June 18, 1979, joint notices of appeal on behalf of all the defendants-appellants were filed;

- 10) On June 21, 1979, the individual defendants-appellants filed a motion to expedite the briefing schedule and oral argument. In that motion appellants said that they would file their brief on the appeal of the June 15, 1979, denial of their motion to vacate the preliminary injunction no later than June 22, 1979. The motion also suggested that both appeals be argued together and that the Government file their brief on June 29, 1979. Implicit in the motion is that the Government's main brief be a joint one responding to both appeals. The motion to expedite was filed only on behalf of the individual defendants-appellants and not on behalf of the defendant-appellant Progressive, Inc. Although The Progressive, Inc., had filed its brief on June 15, 1979 in Appeal No. 79-1428, it had not taken a position as to when it could file its brief in No. 79-1664. The United States of America opposed the motion to expedite because the time suggested for filing its brief was inadequate for such a complex and important case;
- 11) Although the appellants moved and were granted on May 18, 1979 permission to file a joint oversized brief in No. 79-1428, the appellants without explanation filed separate briefs. The brief of the United States must

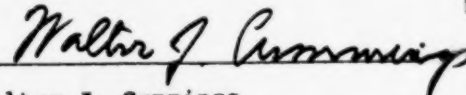
respond to the appellants' briefs in No. 79-1428 which were filed on June 15, 1979 and the five amicus briefs which were filed on May 21, May 23, May 23, June 11, and June 22. Although a party may file his brief prior to the due date, neither appellant's brief was filed until June 15, 1979, the date due. However, three of the amicus filed briefs in support of appellants by May 23;

- 12) In No. 79-1664, the appellants' briefs are due July 13, 1979. Defendants-appellants Knoll, Day, and Morland stated in their motion of June 21, 1979, to expedite, that they would file their brief on June 22, 1979. It has not yet been filed;
- 13) In the affidavit of John L. Gubbins which is attached, there is a documented effort on the part of the United States Court of Appeals for the Seventh Circuit to expedite these appeals. However, expedition was initially rejected by appellants because of indecision as to whether to go forward with the appeal. The court's efforts to expedite the appeal were later rebuffed because counsel wanted more time to thoroughly and adequately brief the appeal. Now that the individual appellants have filed a brief in No. 79-1428 and are prepared to file their brief in No. 79-1664, expedition of the filing of the

United States of America's brief and the earlier setting of oral argument is now sought by them. The position of the appellant Progressive, Inc., and the ability of its counsel to file a brief sooner than the scheduled date of July 13, 1979, are not known;

- 14) The Prayer of the Petition for Writ of Mandamus is only directed to expedition of the second appeal, No. 79-1664. The second appeal is from the June 15, 1979, denial of the motion to vacate the injunction of March 26, 1979. However, both appeals should be considered together and the court should have briefs in No. 79-1664 from the individual defendants-appellants, the defendant-appellant Progressive, Inc., and the United States of America before the appeals are orally argued;
- 15) In light of the record in this case, this court's order of June 21, 1979, granting in part defendants-appellants' motion to expedite is a reasonable decision, and oral argument during the week of September 10, 1979, remains a suitable choice.

Wherefore, the judges of the United States Court of Appeals for the Seventh Circuit pray that the motion for leave to file the Petition for Writ of Mandamus be denied.

  
Walter J. Cummings  
Acting Chief Judge

STATE OF ILLINOIS )  
COUNTY OF COOK ) SS

Affidavit of John L. Gubbins

John L. Gubbins under oath deposes and says:

1. He is Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit.

2. Among his duties as Senior Staff Attorney, Mr. Gubbins assists the Judges of the Court of Appeals at prehearing conferences called pursuant to Rule 33 of the Federal Rules of Appellate Procedure. The Court of Appeals orders prehearing conferences to discuss with litigants simplification of the issues under review, to set a schedule for the filing of the record and the briefs, to consider consolidation of related appeals and to discuss such other matters as may aid in the expeditious disposition of the appeal. In civil cases, the Court of Appeals orders prehearing conferences only in those cases where there are numerous parties to the appeal, or where the issues raised are complex, or where important social and constitutional questions are raised.

3. As Senior Staff Attorney he participated in two prehearing conferences in United States of America v. The Progressive Inc., Erwin Knoll, Samuel Day, Jr., and Howard Morland, Appeal Nos. 79-1428 and 79-1664.

4. After the first prehearing conference was held, an order issued May 17, 1979 memorializing a briefing schedule which had been agreed upon by the parties.

5. Prior to the first prehearing conference Mr. Gubbins had numerous telephone conversations with the attorneys for the parties in which he urged expedition of the appeal. On March 26, 1979, Judge Warren entered his order enjoining publication of "The H-Bomb Secret - How We Got It, Why We're Telling It." Appellants filed their notice of appeal more than two weeks later on April 12, 1979. Between the date Judge Warren entered his order and the date appellants filed their notice of appeal, Mr. Gubbins had several conversations with Brady Williamson of the firm LaFollette, Sinykin, Anderson and Munson who represented The Progressive, Inc. in which he urged Mr. Williamson to file his notice of appeal quickly so that the case could be docketed and an expedited briefing schedule could be set. Mr. Gubbins also informed Williamson that the last day which the Court of Appeals would sit before summer recess was June 18, 1979. Mr. Gubbins indicated that if the parties agreed to shortened periods for filing their briefs and by moving quickly, the court would set oral argument before its summer recess.

6. Appellants filed their notice of appeal April 12, 1979 and their appearances on April 26, 1979. During this two week period Mr. Gubbins had numerous conversations with counsel for both parties. He suggested to them that a prehearing

conference be held, but he was assured by all counsel that a briefing schedule had been agreed upon, and that the parties desired early oral argument of the appeal, and that there would be no need for a prehearing conference. Mr. Gubbins told counsel to direct a motion to the Court of Appeals asking for oral argument, and he prevailed upon them to participate in a prehearing conference so that any problems frustrating an expeditious hearing of their appeal could be dealt with.

7. On April 20, 1979, counsel for The Progressive, Inc. filed with the Court of Appeals their motion for an expedited appeal. In that motion, they sought the following briefing schedule:

Defendants' brief to be delivered in hand to counsel for the Plaintiff on May 14, 1979;

Plaintiff's brief to be delivered in hand to counsel for Defendants on June 13, 1979; and

Defendants' reply brief to be delivered in hand to counsel for the Plaintiff on June 23, 1979.

Counsel also sought a date for oral argument. They agreed it was to be scheduled no earlier than June 28, 1979 in order to allow counsel for appellant an opportunity to consider the Government's reply brief.

8. On April 20, 1979, counsel for The Progressive, Inc. also filed their suggestion for a hearing en banc.

9. Shortly after appellants filed both motions Mr. Brady Williamson spoke by telephone with Mr. Gubbins asking him to hold up consideration and disposition of the motion to expedite and the suggestion for a hearing en banc.

10. One week later Mr. Williamson spoke by telephone with Mr. Gubbins again and informed him at that time that the Court

should go ahead to consider the motion to expedite and the suggestion for a hearing en banc. Mr. Gubbins scheduled the consideration of both motions to be by all the Judges of the Court of Appeals at a meeting set for May 2, 1979.

11. Prior to May 2, 1979, Mr. Gubbins held a prehearing conference to discuss the briefing schedule which the parties had agreed upon. The appellants indicated that they did not wish to adhere to the briefing schedule which they had earlier set out in their motion to expedite. They wanted it extended a week and they agreed with government counsel to the following schedule:

Defendants' brief to be filed on May 21, 1979.

Plaintiffs's brief to be filed on June 20, 1979.

Defendants' reply brief to be filed on June 30, 1979.

Oral argument by agreement of the parties was not to be set earlier than July 16, 1979.

12. On May 2, 1979, one hour before the time for consideration of appellants' motions at a meeting of all the Judges of the Court of Appeals, Mr. Williamson telephoned Mr. Gubbins and asked him to suspend any consideration of the motion to expedite. Mr. Williamson indicated that several events had taken place which would moot the appeal. Mr. Gubbins informed the Court of Mr. Williamson's call and no action was taken.

13. On May 7, 1979, appellants filed their motion to take judicial notice of adjudicative facts. By this motion appellants sought to have this Court take judicial notice of recently published reports and articles.

14. On May 9, 1979, appellants filed their motion to modify protective order. In that matter, appellants stated that the protective order of the district court prevented them from thoroughly reviewing and briefing the technical documents maintained in camera.

15. On May 16, 1979, the Court of Appeals denied the appellants' suggestion for a hearing en banc. The Court also denied appellants' motion to expedite setting oral argument. The Court determined not to hear oral argument in the latter part of July since it could be set for oral argument for the week of September 10, 1979, the very first week the Court convenes after its summer recess.

16. On May 17, 1979, the Court issued its order memorializing the briefing schedule agreed upon by counsel for both parties at the prehearing conference.

17. After preliminary consideration of appellants' motion to take judicial notice and motion to modify the protective order, the Court decided to call a second prehearing conference. This second conference took place May 24, 1979. Judges William Bauer, Luther Swygert, and Harlington Wood, Jr. presided and all counsel participated. The conference was in two parts and it took two and a half hours overall.

18. All counsel agreed at the prehearing conference of May 24, 1979 to modify the protective order governing the in camera materials, to set a new briefing schedule and to seek reconsideration from the district court of its injunction order of March 26, 1979 in the light of the recently published reports and articles submitted by appellants.

19. At the prehearing conference of May 24, 1979, there was no discussion concerning the scheduling of oral argument before September 10, 1979.

20. On June 5, 1979, the Court issued its order disposing of appellants' motions and memorializing the new agreed briefing schedule. The revised briefing schedule was set as follows:

The defendants-appellants shall file their brief on or before June 15, 1979.

The plaintiff-appellee shall file its brief on or before July 15, 1979.

The defendants-appellants shall file their reply brief, if any, on or before August 1, 1979.

21. All three Judges at the prehearing conference of May 24, 1979 indicated they wished to have time before oral argument to review the briefs and determine whether further briefing on any issue was necessary. The Court also indicated that there should be some leeway in case any of the parties needed additional time to prepare their briefs.

22. On June 15, 1979, Judge Warren denied appellants' motion for reconsideration. That very day appellants filed their notice of appeal. (Appeal No. 79-1664).

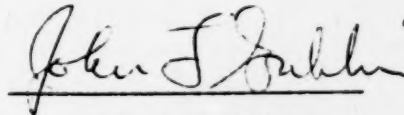
23. On June 21, 1979, appellants filed a second motion for expedited briefing schedule and oral argument. The Court granted this motion in part setting the following briefing schedule:

The brief of the defendants-appellants shall be filed herein on or before July 13, 1979.

The brief of the plaintiff-appellee shall be filed herein on or before August 7, 1979.

The reply brief, if any, of the defendants-appellants shall be filed herein on or before August 20, 1979.

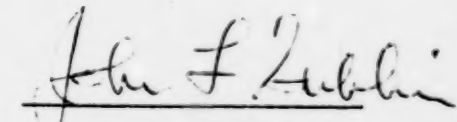
24. Appellants have not yet filed a brief in Appeal No. 79-1664.

  
John L. Gubbins

Dated: June 25, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 1979, copies of the Response and Affidavit have been served on the Honorable Wade H. McCree, Solicitor General of the United States, on the Honorable Barbara Allen Babcock, Assistant Attorney General of the United States, on Michael Hertz, attorney for the United States Justice Department, on Earl Munson, Jr., Counsel for the Progressive, Inc., on Mark H. Lynch, Counsel for petitioners Knoll and Day, and on Paul L. Friedman, counsel for petitioner Morland, by United States mail. I certify that all parties required to be served have been served.

  
John L. Gubbins

No. 78-1904

Supreme Court, U. S.  
**FILED**

**JUN 27 1979**

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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HOWARD MORLAND, ET AL., PETITIONERS

v.

THE HONORABLE ROBERT A. SPRECHER, ET AL.

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ON MOTION FOR LEAVE TO FILE A PETITION FOR  
A WRIT OF MANDAMUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1978

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HOWARD MORLAND, ET AL., PETITIONERS

*v.*

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ON MOTION FOR LEAVE TO FILE A PETITION FOR  
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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## **OPINIONS BELOW**

The initial opinion of the district court (Pet. App. 1a) is reported at 467 F. Supp. 990. The court of appeals' order of May 16, 1979 (App. A, *infra*), denying petitioners' motion for expedited hearing, but setting argument for the week of September 10, 1979, is unreported, as is the June 5, 1979, order (App. B, *infra*) establishing a briefing schedule and setting oral argument for September 10, 1979. The district

(1)

court's public order (Pet. App. 12a), and its in camera memorandum and order (Pet. App. 13a) of June 15, 1979, have not been reported. The order of one judge of the court of appeals consolidating petitioners' appeals and granting in part petitioners' motion for an expedited briefing schedule (Pet. App. 20a) also is unreported.

### JURISDICTION

The order of one judge of the court of appeals granting in part petitioners' motion for an expedited briefing schedule (Pet. App. 20a) was entered on June 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1651.

### QUESTION PRESENTED

Whether mandamus should issue to order the court of appeals to alter the briefing and argument schedule one of its judges established for petitioners' consolidated appeals.

### STATEMENT

On March 26, 1979, the United States District Court for the Western District of Wisconsin entered a preliminary injunction restraining petitioners Morland, Day, and Knoll (as well as The Progressive, Inc., which has not joined in this request for mandamus) from publishing or otherwise disseminating an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It" (Pet. App. 1a-11a). The article contains descriptions of technical principles

relating to the production of thermonuclear weapons, including basic design concepts and specific design features of United States thermonuclear weapons. The article also contains schematic depictions of such weapons. After considering numerous affidavits and hearing one witness, the district court found (Pet. App. 10a) that the basic principles disclosed by the article had not appeared authoritatively in public journals or been officially confirmed, and it held that these concepts are properly classified as "Secret Restricted Data" under the Atomic Energy Act of 1954, 42 U.S.C. 2014(y). The district court further found that the article "contains concepts that are not found in the public realm," and that publication of the secret restricted data in the article "would provide vital information on key concepts involved in the construction of a practical thermonuclear weapon" (Pet. App. 10a).

The four defendants filed a joint notice of appeal from the March 26, 1979, preliminary injunction. Although aware that the last date for hearings before the Seventh Circuit's summer recess was June 18, 1979,<sup>1</sup> the appellants filed a joint motion for expedition (App. C, *infra*, 11a), which proposed that appellants file their brief on May 14, 1979 (49 days after entry of the preliminary injunction), that the United States file its brief 30 days later, and that

<sup>1</sup> The Seventh Circuit's Senior Staff Law Clerk, who discussed the procedures for expedition with petitioners' counsel, has advised us that he informed petitioners' counsel of the court's calendar.

petitioners file their reply brief after 10 additional days. The motion then proposed (*ibid.*) that oral argument be scheduled "no earlier than June 28, 1979" in order to give government counsel time to consider appellants' reply brief.<sup>2</sup>

On May 16, 1979, the court of appeals issued an order en banc (App. A, *infra*) which denied the motion for expedition but set oral argument for the week of September 10, 1979, the first week after the summer recess. Petitioners did not seek reconsideration or review of that order.

After a docketing conference held on May 24, 1979, to consider pending motions, a three-judge panel set a briefing schedule giving petitioners until June 15, 1979, within which to file their briefs, and giving the United States until July 15, 1979, to file its response (App. B, *infra*, 7a). This schedule used the 30 days for briefing by the United States that petitioners themselves proposed, and it gave additional time to petitioners. Oral argument was set for September 10, 1979 (*ibid.*). The court of appeals' order following the docketing conference also encouraged petitioners to proceed expeditiously in the district court on their motion to reconsider and vacate the preliminary injunction so that the appeal, if any, from the district court's ruling on that motion also could be heard on September 10, 1979 (App. B, *infra*, 5a-6a).

<sup>2</sup> The motion bore the names of all the firms or organizations now representing petitioners, with the exception of White & Case, which was more recently retained as additional counsel for petitioner Morland.

Petitioners did not seek reconsideration or review of that order. Pursuant to this briefing schedule, petitioners filed their principal appellate briefs on June 15, 1979, 81 days after entry of the preliminary injunction.

The district court then set an expedited briefing schedule on petitioners' motion to vacate the injunction. On June 15, 1979, after considering hundreds of pages of materials and detailed affidavits, the district court denied the motion and issued an *in camera* opinion (Pet. App. 12a). The court considered the effect of each of the articles published or discovered by defendants after entry of the preliminary injunction, as well as the two government reports that had been mistakenly treated as declassified and placed in the public section of the Los Alamos Scientific Laboratory for limited periods (Pet. App. 13a-16a). The district court found that whether the information in dispute in this case has been disclosed through the mistaken exposure of the documents is conjectural, and that such an exposure of secret restricted data should not bar the government from preventing further release, if that release would jeopardize national security. Although the court recognized that one or more of the pieces of information in dispute had been the subject of mention or speculation in public, it concluded that there is an important difference between describing key concepts of the design of thermonuclear weapons with specificity (which the article does) and merely mentioning numerous concepts that may or may not be important and relevant. The Mor-

land article is unlike anything now available, the court found, because it alone provides an accurate, detailed and comprehensive description and analysis of hydrogen weapon construction (Pet. App. 18a).

On June 15—81 days after the entry of the preliminary injunction, and the day they filed their principal appellate brief—all defendants filed a joint notice of appeal from the order denying the motion to vacate. Petitioners also filed a motion for an expedited briefing schedule and oral argument, but The Progressive did not join in the motion. Petitioners' motion proposed that the appeal from the denial of the motion to vacate be consolidated with their earlier appeal from the grant of the preliminary injunction. Petitioners offered to file their brief regarding the denial of their motion to vacate within seven days, and they requested that the United States be required to file its response to both appeals within 14 days of its receipt of petitioners' *principal* brief (*i.e.*, by June 29, which would be no more than seven days after receipt of petitioners' brief on their subsequent appeal). Finally, petitioners proposed that the consolidated appeals be heard on the earliest possible date thereafter.

On June 21, 1979, Judge Sprecher granted the motion to expedite in part, but rejected petitioners' proposed briefing and argument schedule (Pet. App. 20a-21a). He consolidated the appeals, set them for argument on September 10, 1979, and set a briefing schedule consistent with that argument date (*ibid.*). Rather than seek reconsideration of Judge Sprecher's

order in the court of appeals, petitioners filed the instant mandamus petition.

### ARGUMENT

The management of its docket is a matter committed to the court of appeals' discretion. The extraordinary writ of mandamus should not be used to compel the court of appeals to alter the schedule it has established for briefing and argument of petitioners' consolidated appeals, especially since petitioners themselves proposed a deliberate schedule for briefing, and made use of all of the time allotted to them—81 days—to prepare their principal brief. Only then did petitioners seek to collapse the remainder of the briefing schedule, giving the United States a maximum of 14 days to prepare its response.<sup>3</sup>

The schedule established by the court of appeals is entirely appropriate in the circumstances of this case. It provides the government with an adequate period to prepare its response to petitioners' briefs, and it allows the court sufficient time to review the complex and voluminous record. Although petitioners contend that the district court's denial of their motion to vacate placed matters in a new light requiring greater expedition, this Court should not override the court

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<sup>3</sup> Because petitioners proposed that the United States' 14 days run from June 15, 1979, when they filed their opening brief on the appeal from the entry of the preliminary injunction, the United States' brief would have been due on June 29. That would have been no more than seven days after petitioners filed their brief on appeal from the denial of the motion to vacate.

of appeals' decision to proceed with the previously established schedule, especially in view of the fact that petitioners failed even to seek reconsideration of this single-judge order by a panel of the court of appeals.

A writ of mandamus issued by this Court is a "drastic and extraordinary" remedy. *Ex parte Fahey*, 332 U.S. 258, 259, 260 (1947). Mandamus may be issued to "'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978) (plurality opinion), quoting *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). A writ of mandamus also may issue to review a "clear abuse of discretion" that amounts to a usurpation of judicial power. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957). But see *Will v. Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 665 n.7 (plurality opinion). The party seeking to obtain a writ of mandamus has a substantial burden; he must show that his "'right to the issuance of the writ is 'clear and indisputable.''" *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). Petitioners have not made the necessary showing.

The lower courts have substantial latitude in scheduling the cases on their dockets. See *Will v. Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 665. The court of appeals did not abuse this discretion in denying petitioners' most recent motion for expedition, and the court certainly did not usurp power or exceed its

jurisdiction. We agree with petitioners that an appellate court should expedite review of any order imposing a prior restraint on speech. But the time necessary for briefing and argument nevertheless varies according to the nature and complexity of the case, and accordingly the reviewing court has discretion to establish a reasonable schedule for review in the circumstances of the particular case. Cf. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329-1330 (1975) (Blackmun, Circuit Justice). The facts here demonstrate that the Seventh Circuit acted responsibly. Even if it erred (which we doubt), correction of mere error is not the office of mandamus.

Petitioners compare the instant case to *New York Times Co. v. United States*, 403 U.S. 713 (1971). In that case the appellants sought immediate review in the appropriate appellate court within hours of each decision, and they filed their briefs and the supporting materials almost as quickly.<sup>4</sup> Here, in contrast, petitioners and the other defendant, The Progressive, made a calculated tactical choice to proceed more deliberately in order to allow themselves adequate time for briefing the complex factual and legal issues involved. For that reason petitioners initially proposed a briefing schedule that afforded them at least 49 days after the entry of the preliminary injunction to prepare their primary brief and

<sup>4</sup> The courts of appeals expedited the cases without prompting by this Court. These decisions thus offer little support for petitioners' assumption that mandamus would have issued to compel greater expedition.

afforded the government at least 30 days to file its response. Petitioners proposed this schedule even though they knew that the earliest argument date they had proposed fell during the court of appeals' summer recess. Petitioners raised no immediate objection to the briefing and argument schedule established by the court, and they took almost three months to draft their principal appellate brief.

The time afforded by the schedule established by the court of appeals was needed because the case involves novel legal issues inextricably bound up with complex technical concepts relating to the production of thermonuclear weapons. The record contains a large number of detailed technical affidavits comparing the concepts contained in the public literature with those in the article subject to the injunction.

Given this background, the court of appeals was entitled to reject a suggestion—made only after petitioners had taken 81 days to file their brief—that the time available to the government and court be compressed drastically. The task of comparing the excerpts petitioners have cited from various technical publications with the information that the government is seeking to protect is a difficult and time consuming one, for the parties as advocates and for the reviewing courts. And in view of the grave consequences that would flow from an erroneous decision resulting in the publication of the hitherto secret core concepts of the hydrogen bomb, the case necessarily calls for careful unhurried study. As the district court pointed out (Pet. App. 10a), the Morland article provides a

“comprehensive, accurate, and detailed analysis of the overall construction and operation of a thermonuclear weapon,” and publication of the information in the article “would be extremely important to a nation seeking a thermonuclear capability, for it would provide vital information on key concepts involved in the construction of a practical weapon.” The information has been secret since its discovery in the early 1950s. Surely society loses little by devoting to this case the few months that are necessary for full and studied consideration. The costs of waiting are slight; the potential costs of any error introduced by unwarranted haste are enormous.

Petitioners contend that circumstances changed significantly when the district court denied their motion to vacate the injunction, and that the schedule previously adopted by the court of appeals was no longer appropriate. But the denial of the motion to vacate did not narrow the issues on appeal. To the contrary, the affidavits received by the district court made the case more difficult and complex. The issues identified in petitioners' principal appellate brief—the proper standard for the issuance of an injunction against publication, the adequacy of the government's affidavits, the standards for demonstrating a violation of the Atomic Energy Act of 1954, 42 U.S.C. 2274(b), the constitutionality of the Act, and whether the material in the Morland article is in the public domain—all are relevant to the court's refusal to vacate the preliminary injunction. Petitioners now seek to avoid the consequences of their acquiescence in the briefing and argument schedule for their original appeal by

viewing their appeal from the denial of the motion to vacate in isolation. But petitioners' new focus should not obscure petitioners' failure to object to the schedule when it was first established by the court of appeals, and it does not explain their failure to ask the court as a whole to review Judge Sprecher's order consolidating the two appeals and adhering to the original briefing schedule. If, as petitioners say, there has been a dramatic change in this case, the Seventh Circuit should be given the opportunity to review the action of its judge, and, if necessary, change his decision. It would be particularly inappropriate for this Court to issue the extraordinary writ of mandamus where petitioners did not even pursue their remedies in the court of appeals.<sup>5</sup>

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<sup>5</sup> The number of avenues not pursued is substantial. Fed. R. App. P. 27(c) allows a panel of the court to review a single-judge order. Petitioners also could have asked the court of appeals to stay the injunction and thus obtained an expedited (if abbreviated) form of review; they did not, however, seek a stay in either the court of appeals or this Court. Petitioners could have expedited the case by seeking certiorari before judgment under 28 U.S.C. 1254(1), but they elected not to do so. And petitioners could have treated the denial of the motion to expedite as a "final decision" to allow the restraint to continue, thus permitting review by certiorari under the approach of *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977); they did not use this avenue either. We do not urge petitioners to do any of these things. This is a complex case, and the more time that is spent on motions the less will be available to attend to the merits. We raise these options only to suggest that mandamus to review a single-judge's order—the avenue petitioners chose—is in our view the least appropriate of all.

## CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

BARBARA ALLEN BABCOCK  
*Assistant Attorney General*

THOMAS S. MARTIN  
*Deputy Assistant Attorney General*

SARA SUN BEALE  
*Assistant to the Solicitor General*

ROBERT E. KOPP  
MICHAEL F. HERTZ  
*Attorneys*

JUNE 25, 1979

1a

APPENDIX A

CORRECTED

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois 60604

CORRECTED ON MAY 18, 1979

May 16, 1979

Before

Hon. LUTHER M. SWYGERT, Circuit Judge  
Hon. WALTER J. CUMMINGS, Circuit Judge  
Hon. WILBUR F. PELL, JR., Circuit Judge  
Hon. ROBERT A. SPRECHER, Circuit Judge  
Hon. PHILIP W. TONE, Circuit Judge  
Hon. WILLIAM J. BAUER, Circuit Judge  
Hon. HARLINGTON WOOD, JR., Circuit Judge

Appeal from the United States District Court  
for the Western District of Wisconsin

Civ. No. 79-C-98

Judge Robert W. Warren

No. 79-1428

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

THE PROGRESSIVE, INC., ET AL.,  
DEFENDANTS-APPELLANTS.

2a

ORDER

The defendants-appellants' motion for a hearing *en banc* is DENIED.

While the motion for expedited hearing is also DENIED, oral argument will be heard during the week of September 10, 1979.

Chief Judge Fairchild has disqualified himself from participation in this case.

3a

APPENDIX B

UNITED STATES COURT OF APPEALS  
For the Seventh Circuit  
Chicago, Illinois 60604

June 5, 1979

Before

Hon. LUTHER M. SWYGERT, Circuit Judge  
Hon. WILLIAM J. BAUER, Circuit Judge  
Hon. HARLINGTON WOOD, JR., Circuit Judge

Appeal from the United States District Court  
for the Western District of Wisconsin

No. 79-C-98

Robert W. Warren, Judge

No. 78-1428

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*vs.*

THE PROGRESSIVE, INC., ERWIN KNOLL,  
SAMUEL DAY, JR., and HOWARD MORLAND,  
DEFENDANTS-APPELLANTS.

This matter comes before the court for its consideration on the filing herein of the following documents:

1. The "MOTION TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS OR TO REMAND TO

DISTRICT COURT TO CONSIDER NEW EVIDENCE" filed herein on May 7, 1979 by counsel for the defendants-appellants.

2. The "IN CAMERA MEMORANDUM IN SUPPORT OF MOTION TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS OR TO REMAND TO DISTRICT COURT TO CONSIDER NEW EVIDENCE" filed herein on May 7, 1979 by counsel for the defendants-appellants.

3. The "IN CAMERA AFFIDAVIT OF EARL MUNSON, JR. IN SUPPORT OF MOTION TO RETAIN JURISDICTION BUT REMAND THE RECORD TO THE UNITED STATES DISTRICT COURT FOR LIMITED HEARING AND, IN THE ALTERNATIVE, FOR JUDICIAL NOTICE" filed herein on May 7, 1979 by counsel for the defendants-appellants.

4. The "SUPPLEMENTAL SUBMISSION OF AFFIDAVIT IN SUPPORT OF MOTION TO TAKE JUDICIAL NOTICE OR LIMITED REMAND" filed herein on May 11, 1979 by counsel for the defendants-appellants.

5. The "OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS OR TO REMAND TO DISTRICT COURT TO CONSIDER NEW EVIDENCE" filed herein on May 14, 1979 by counsel for the plaintiff-appellee.

6. The "APPELLEE'S MOTION TO PROVIDE SECURITY FOR BRIEFS AND OTHER DOCU-

MENTS PREPARED FOR THIS APPEAL" filed herein on May 1, 1979 by counsel for the plaintiff-appellee.

7. The "APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO PROVIDE SECURITY FOR BRIEFS AND OTHER DOCUMENTS PREPARED FOR THIS APPEAL" filed herein on May 9, 1979 by counsel for defendants-appellants.

8. The "MOTION TO MODIFY PROTECTIVE ORDER" filed herein on May 9, 1979 by counsel for the defendants-appellants.

9. The "AFFIDAVIT IN SUPPORT OF MOTION FOR CUSTODY OR USE OF PLAINTIFF'S IN CAMERA MATERIALS" filed herein on May 9, 1979 by counsel for the defendants-appellants.

10. The "UNITED STATES' OPPOSITION TO APPELLANTS' MOTION TO MODIFY PROTECTIVE ORDER" filed herein on May 18, 1979 by counsel for the plaintiff-appellee.

This court has considered the above documents and has met in conference with attorneys for the parties to this appeal. On consideration whereof,

IT IS ORDERED that the motion to take judicial notice or for limited remand to the district court is hereby HELD IN ABEYANCE pending further order of this Court. The parties are encouraged to apply, expeditiously, to the district court for appropriate relief, if any, under the procedures approved by this Court in *Washington v. Board of Education*,

498 F.2d 11, 15-16 (7th Cir. 1974), and *Binks Manufacturing Co. v. Ransburg Electro-Coating Corp.*, 281 F.2d 252, 260-61 (7th Cir. 1960), *cert. dismissed*, 366 U.S. 211 (1961).

IT IS FURTHER ORDERED that the protective order entered by the district court in this case is hereby MODIFIED in accord with the agreement on procedures which has been reached by the parties. The agreement as to the protective order, which is approved by this Court, is attached hereto as Exhibit A.

IT IS ALSO FURTHER ORDERED that security for briefs and documents filed in this appeal shall be provided under the terms of the following order:

1. On March 14, 1979, the district court issued a protective order which prohibits the disclosure of Secret Restricted Data pursuant to the Atomic Energy Act of 1954, 42 U.S.C. § 2014, or other classified information except under specified limitations and conditions. The district court's protective order, as modified by this Court, remains fully effective. This order implements the district court's protective order in the context of the procedures of this Court.

2. To implement that order, the required number of copies of the appellants' brief and reply brief shall be initially filed with the Clerk of Court *in camera*. Within five (5) days (three (3) days for the reply brief) of receipt of the copies of such briefs, the United States shall advise appellants as to those portions of the brief, if any, it requires to remain *in*

*camera*. If appellants object to the continued *in camera* status of material designated by the United States, and the parties fail to resolve any differences, the matter shall be resolved by the court at the earliest convenient opportunity. Thereafter, appellant shall file publicly an additional set of briefs with the Clerk of the Court which do not contain *in camera* materials as designated by the United States, unless otherwise allowed by this Court.

3. Any other documents, *e.g.*, appendices, motions, etc., which disclose information submitted *in camera* in the district court shall be subject to the procedures of paragraph 2 applicable to appellants' main brief.

IT IS ALSO FURTHER ORDERED that the following revised briefing schedule is hereby ADOPTED:

1. The defendants-appellants shall file their brief on or before June 15, 1979.

2. The plaintiff-appellee shall file its brief on or before July 15, 1979.

3. The defendants-appellants shall file their reply brief, if any, on or before August 1, 1979.

4. Oral argument in this matter will be heard on September 10, 1979 at 2:00 p.m.

## EXHIBIT "A"

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

No. 79-1428

[U.S.C.A.—7th Circuit—Filed May 30, 1979—  
Thomas F. Strubbe]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

THE PROGRESSIVE, INC., ERWIN KNOLL,  
SAMUEL DAY, JR., and HOWARD MORLAND,  
DEFENDANTS-APPELLANTS.

## STIPULATION

On March 14, 1979, the district court entered a protective order in this case. Plaintiff wishes to re-emphasize the very sensitive nature of the *in camera* material filed by the United States, and protected by the district court's protective order. However, because of the concerns expressed by this Court, plaintiff is willing to stipulate that for purposes of the proceedings in this Court the protective order is modified as follows:

1. That defendants are allowed to remove any notes they may take on the *in camera* materials filed by the United States from the U.S. Attorney's office, but such *in camera* materials themselves shall remain in the U.S. Attorney's office. The defendants will re-

tain these notes in a secure manner and store them in a safe provided and approved by the Department of Energy. Persons having access to the safe must be cleared by the United States, and only those individuals may have access to the notes.

2. The notes shall be subject to the district court's protective order, and the defendants cannot make copies of those notes.

3. At the time defendants' principal brief is filed, their notes shall be returned to the safe in the U.S. Attorney's office. At the time plaintiff files its brief, the defendants may again remove those notes from the U.S. Attorney's office to the safe in their office under the conditions described in paragraph 1 above. After they file their reply brief, the defendants shall return their notes to the U.S. Attorney's office.

4. Except to the extent modified herein, the district court's protective order of March 14, 1979, as previously amended, shall remain fully in effect. This stipulation is without prejudice to defendants' right to seek further amendment of the protective order in the district court.

The defendants consent to the provisions set forth in paragraphs 1 through 4 above.

For the Defendants-Appellants

/s/ Earl Munson, Jr.  
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10a

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For the United States

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Deputy Assistant Attorney  
General

/s/ Robert E. Kopp  
ROBERT E. KOPP

/s/ Michael F. Hertz  
MICHAEL F. HERTZ  
Attorneys  
Appellate Staff  
Civil Division  
Department of Justice  
Washington, D.C. 20530

11a

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

Western District of Wisc.

Civil Action No. 79-C-98

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

THE PROGRESSIVE, INC., ERWIN KNOLL,  
SAMUEL DAY, JR., and HOWARD MORLAND,  
DEFENDANTS-APPELLANTS.

MOTION FOR EXPEDITED APPEAL

Defendants jointly move this Court to expedite its consideration of this matter and to schedule oral argument as soon as the business of the Court will permit and subject to the following schedule agreed to between counsel for the plaintiff and counsel for the defendants:

Defendants' Brief to be delivered in hand to counsel for the Plaintiff on May 14, 1979;

Plaintiff's brief to be delivered in hand to counsel for Defendants on June 13, 1979;

Defendants' reply brief to be delivered in hand to counsel for the Plaintiff on June 23, 1979; and

Oral argument to be scheduled no earlier than June 28, 1979 in order to allow counsel for the Plaintiff an opportunity to consider the Defendants' reply brief.

The foregoing schedule is subject to modification should the business of the Court require that oral argument be scheduled subsequent to June 29, 1979.

In support of their motions, defendants state that:

1. This is an appeal from a preliminary injunction issued by the District Court for the Western District of Wisconsin on March 26, 1979 enjoining defendants from publishing an article in *The Progressive* magazine.

2. The statutory and constitutional issues resolved by the District Court in granting such preliminary injunction are fundamental, unique and of exceptional importance.

3. The preliminary injunction poses extreme hardship upon defendants, preventing them from publishing an article, speaking or writing about certain subjects in the article, depriving them of their First Amendment rights and discouraging the free exercise of those rights by others.

4. With the exception of the transcripts of three brief hearings, the record in the court below consists entirely of affidavits submitted by the parties.

5. Counsel for the plaintiff has no objection to the time schedule set forth above so long as the time limitations on their preparation of a brief and review of a reply brief are not more restricted than those stated above.

Dated this 20th day of April, 1979.

LA FOLLETTE, SINYKIN,  
ANDERSON & MUNSON

By /s/ Earl Munson, Jr.  
EARL MUNSON, JR.  
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Samuel Day, Jr. and  
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THOMAS P. FOX, ESQ.  
202 State Street  
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Attorney for  
Howard Morland

## CERTIFICATE OF SERVICE

Earl Munson, Jr. certifies that on the 20th day of April, 1979, a true and correct copy of Defendants Suggestion for Hearing *in banc*, Motion for Expedited Appeal and Memorandum in Support of such Suggestion and Motion was served on counsel for Plaintiff by mailing a copy to:

Robert E. Kopp, Esq.  
Deputy Director, Appellate Staff  
Civil Division  
United States Department of Justice  
Washington, D.C. 20530

Thomas S. Martin, Esq.  
Deputy Assistant Attorney General  
United States Department of Justice  
Washington, D.C. 20530

Michael F. Hertz, Esq.  
Attorney, Appellate Staff  
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Washington, D.C. 20530

Frank M. Tuerkheimer, Esq.  
United States Attorney  
P. O. Box 112  
Madison, WI 53701

/s/ Earl Munson, Jr.  
EARL MUNSON, JR.

JUN 27 1979

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. 78-1904

HOWARD MORLAND, ET AL.,  
PETITIONERS

v.

THE HONORABLE ROBERT A. SPRECHER, ET AL.,  
RESPONDENTS.

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PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED  
STATES IN OPPOSITION AND THE RESPONSE  
OF THE UNITED STATES COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT

---

Petitioners are seeking a writ of mandamus directing the United States Court of Appeals for the Seventh Circuit to expedite review of the district court's order of June 15, 1979. Neither the United States nor the Court of Appeals presents any persuasive reason why the appeal from this order cannot be and should not be expedited. Rather, they oppose the petition for mandamus on the ground that petitioners did not do everything they could have done to expedite review of the district court's earlier order of March 26, 1979. Those objections are irrelevant to the present petition. The point is that petitioners and their current counsel have done everything that could be done to expedite review of the June 15 order, which is the only order at issue here.<sup>1/</sup>

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<sup>1/</sup> Within minutes of the district court's order of June 15, a notice of appeal was filed in the district court in Milwaukee and motion for expedited appeal was filed in the Court of Appeals in Chicago. This petition was filed within 48 hours of the Court of Appeals' Order denying expedited review.

The brief of the United States requires no further reply. The response of the Court of Appeals, on the other hand, cites specific instances in which counsel for The Progressive, Inc. made representations to the Court which may have led it to deny expedition of the appeal from the March 26 order. See Affidavit of John L. Gubbins. Suffice it to say that the undersigned counsel did not agree with or acquiesce in all of those representations. Indeed, they did not even have knowledge of many of the representations until they read Mr. Gubbins' affidavit. But, we reiterate, the facts mentioned in the Court of Appeals' response and in Mr. Gubbins' affidavit are not relevant to the questions at issue here. The actions of counsel for The Progressive, Inc. with respect to the appeal from the March 26 order are not reasons to deny expeditious consideration of the claims of petitioners in the appeal from the district court's June 15 decision.

An 87-day delay in hearing argument on the appeal from the district court's June 15 order continuing a prior restraint is an intolerable burden on petitioner's First Amendment rights. For the reasons set forth in our petition, the Court of Appeals should be directed to expedite the appeal.

June 27, 1979

Respectfully submitted,

Bruce J. Ennis  
Mark H. Lynch  
Aviam Soifer

John J. McAvoy  
Paul L. Friedman

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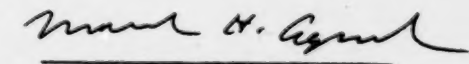
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Attorneys for Petitioners  
Knoll and Day

Attorneys for Petitioner Morland

#### CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply have been served by hand this 27th day of June, 1979 upon the Honorable Wade H. McCree, Solicitor General of the United States, and upon the Honorable Barbara Allen Babcock, Assistant Attorney General of the United States. Copies have been express mailed to John L. Gubbins, Esquire, Senior Staff Attorney, United States Court of Appeals for the Seventh Circuit, and to Earl Munson, Jr., Esquire. I further certify that all parties required to be served have been served.

  
Mark H. Lynch